



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MALINDI

Criminal Case 6 of 2004

REPUBLIC.....PROSECUTOR

VERSUS

FRANCIS GICHOYI MUTHONI.....ACCUSED

JUDGMENT

The accused in this case, Francis Gichohi Muthoni is charged with murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars are that on 22nd day of November, 2003 at about 7.30 pm at Kihongwe trading centre Mpeketoni; Lamu he murdered Simon Muiruri Mwangi.

To support these charges the prosecution called ten witnesses. The facts of the case in the eyes of prosecution witnesses were that on the fateful day, the accused and the deceased who were great friends borrowed bicycles separately at different times from different people. The deceased borrowed a bicycle from Michael Kimani (PW 2) while Daniel Mbugua Kamau (PW 3) gave his bicycle to the accused. It was, however, confirmed from the evidence that none of the witnesses saw the deceased and accused on the fateful day together. A few minutes after borrowing bicycles, at about 7 pm Moses Msadavi Kariani (PW 1) came across the deceased by the road side. He called out three times but the deceased did not respond. Instead the accused appeared from his house and ordered PW 1 to take a certain bicycle to a hotel at the trading centre. PW 1 informed the few people he met and before long a large crowd gathered at the scene where the body of the deceased was lying. According to witnesses the body was partly on the roadside and partly on the steps leading to the accused person's door. Among the first people to arrive at the scene shortly after PW 1 and confirmed the position of the body. They also confirmed that the accused locked himself up in his house and his door had to be broken. The body of the deceased was examined by a clinical officer, Don Munano Gikonyo (PW 7), who conducted post-mortem on it and prepared a post-mortem report. He noted that the deceased person's body had deep penetrating wounds next to the right eye, a fractured right mandible, fracture on the bone behind the ear, a wound on the back of the head and fracture of the left hand. In his opinion the cause of death was due to head injuries involving the brain and severe bleeding.

In his defence the accused confirmed his close friendship with the deceased, whom he had known since 1978. On the morning of the day in question, the accused had gone to do some work at the home of a lady he referred to as Mama Wangari. At 6.30 pm. He returned home and went to bed. While in bed he heard people banging on his door. He identified one of those who were banging on the door as Mutwiri. He noticed that they had an axe. When he came out he saw the deceased lying down dead. It was his evidence that the whole of that day he did not see the deceased met his death.

I have carefully considered this evidence. I have also considered submissions by counsel on both sides as well as the opinion of the assessors.

It is a fact that there is no direct evidence as to who inflicted the wounds on the deceased from which he died. The evidence adduced by the prosecution is only circumstantial. In order to base a conviction on circumstantial evidence, the Court must be satisfied that that evidence points irresistibly at the guilt of the accused person to the exclusion of any other person or persons. There must not be other co-existing factors which will weaken or even destroy the inference of the accused person's guilt. It is the duty of the prosecution to prove facts which justify the drawing of the inference of the accused person's guilt. These

are the requirements according to decided cases which must guide the Court in order to justify a finding of guilt based on circumstantial evidence.

The celebrated case of *R V Kipkering Arap Koske and Another*, (1949) 16 EACA 135, which was followed with approval by the cases of *Musoke V R* 1958 EA 715 and in the more recent case of *Sawe V R* 2003 KLR 364, among others.

Are there circumstances in this case which point irresistibly to the guilt of the accused to the exclusion of all other persons? The evidence led was to the effect that the deceased person's body was lying on the door step of the accused person's house. That it had injuries from which he died. That there was evidence on the ground that his death was caused on the spot where the body was lying. There was also evidence that there was a stone and stick next to the body. Apart from these facts, evidence was also led that the accused person did not come out despite hearing the crowd that had gathered outside his house. That he did not respond to the banging on the door and was retrieved only after the door was broken. A jembe with blood stains was recovered from the accused person's house. All this only goes to show that the accused inflicted the injuries on the deceased and I so find. Were the injuries the cause of the deceased person's death? PW 7, Don Munano Gikonyo conducted the post-mortem examination forms are addressed to Pathologist/Medical officer.

Secondly, Section 386 of the Criminal Procedure Code provides as follows:

“386. (1). The officer in charge of a police station, or any other officer especially empowered by the Minister in that behalf, on receiving information that a person –

(a)

(b) has been killed by another or by an accident; or

(c) has died under circumstances raising reasonable suspicion that some other person has committed an offence,shall proceed to the place where the body of the deceased person is, and shall there make an investigation and draw up a report on the apparent cause of death, describing such wounds, fractures, bruises and other marks of injury as may be found on the body, and stating in what manner, or by what manner, or by what weapon or instrument (if any), the marks appear to have been inflicted.....”

Sub-Section 2 provides that

“ When there is any doubt regarding the cause of death, or when for any other reasons the police officer considers it expedient to do so, he shall subject to any rule made by the Minister, forward the body, with a view to its being examined, to the nearest Medical officer or other person appointed by the Minister in that behalf, if the state of the weather and the distance admit of its being so forwarded without risk of such putrefaction on the road as would render the examination useless”

From this, it is clear that examination of a deceased person's body who has died in the circumstances described above can only be conducted by either a medical officer or any other person appointed by the Minister in view of the weather and the distance to the nearest medical officer.

Is a clinical officer a medical officer?

The term Medical Officer is defined in the Anatomy Act, (Section 2) Cap 249 to mean

“a public officer who would, if he applied, be entitled to be registered as a medical practitioner”.

The following persons are eligible to be registered as medical practitioners under Section 11 of the Medical Practitioners and Dentist Act;

-A holder of a degree, diploma or any qualification recognized by the Medical Practitioners

and Dentists Board, who after obtaining the degree of diploma has engaged in training employment in a resident medical capacity in one or more institutions for a period of not less than one year; and have acquired sufficient knowledge of, and experience in the practice of medicine and is of good moral character and fit and proper person to be registered.

PW 7 is a holder of a diploma in medicine and surgery. With 28 years experience in public hospitals. Is PW 7 eligible to be registered as a medical practitioner, on account of his qualification as a diploma holder? – and in view of his long experience?. I think the answer is yes. PW 7 qualifies under Section 2 of the Medical Practitioners and Dentist Act to be registered as a medical practitioner and was therefore qualified to conduct post-mortem examination on the body of the deceased.

The injuries described by PW7 point to the fact that they were caused by both sharp and blunt object. A stick, stone and jembe were ground at the scene and must have been used due to blood stains on them.

Given the close proximity of the accused person's house and the spot where the deceased was found lying with injuries and the recovery of the likely murder weapons at the scene and in the accused person's house and the fact of the accused locking himself up in the house, in my view point irresistibly to the guilt of the accused person to the exclusion of any other person. I also find no co-existing circumstances that tend to weaken or destroy the chain of circumstances pointing to the guilt of the accused. I find as a fact that he inflicted the injuries that caused the death of the deceased. From the nature of these injuries – namely deep penetrating wounds next to the eye, a fracture on the right mandible, deep wound and fracture of bone behind the ear, wound on the back of the head, and a deep wound and fracture of the left hand. I conclude that by repeatedly inflicting these injuries, the accused death of the deceased. I find no merit in his defence that he did not see the deceased on that day. It is also not true that he did not know how he met his death. The two assessors who participated in the trial, after the discharge of the third assessor, returned a unanimous verdict of guilty of murder.

I find the accused person guilty of murder and convict him accordingly. He shall suffer death in accordance with the law. Orders accordingly.

Dated and delivered this 29th day of July 2005.

W. OUKO

JUDGE

29.7.2005

Before W. Ouko J.

Mr.Mrima for Mr.Musyoki for accused.

Mr.Ogoti for the state

C.C. Gladys

1st & 2nd assessor present.

Mr.Ogoti:

The 3rd assessor is admitted at Port Reitz Hospital Mombasa.

W.OUKO

JUDGE

Court: For these reasons judgment is delivered in the presence of two assessors. Pay the two assessors.

W.OUKO

JUDGE